

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2589

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To be argued by
BART M. SCHWARTZ

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2589

UNITED STATES OF AMERICA,

Appellee,

—v.—

AHARON RON,

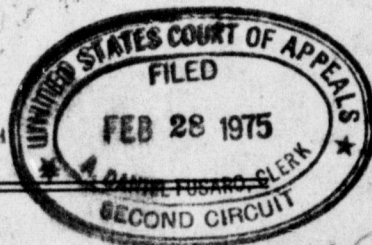
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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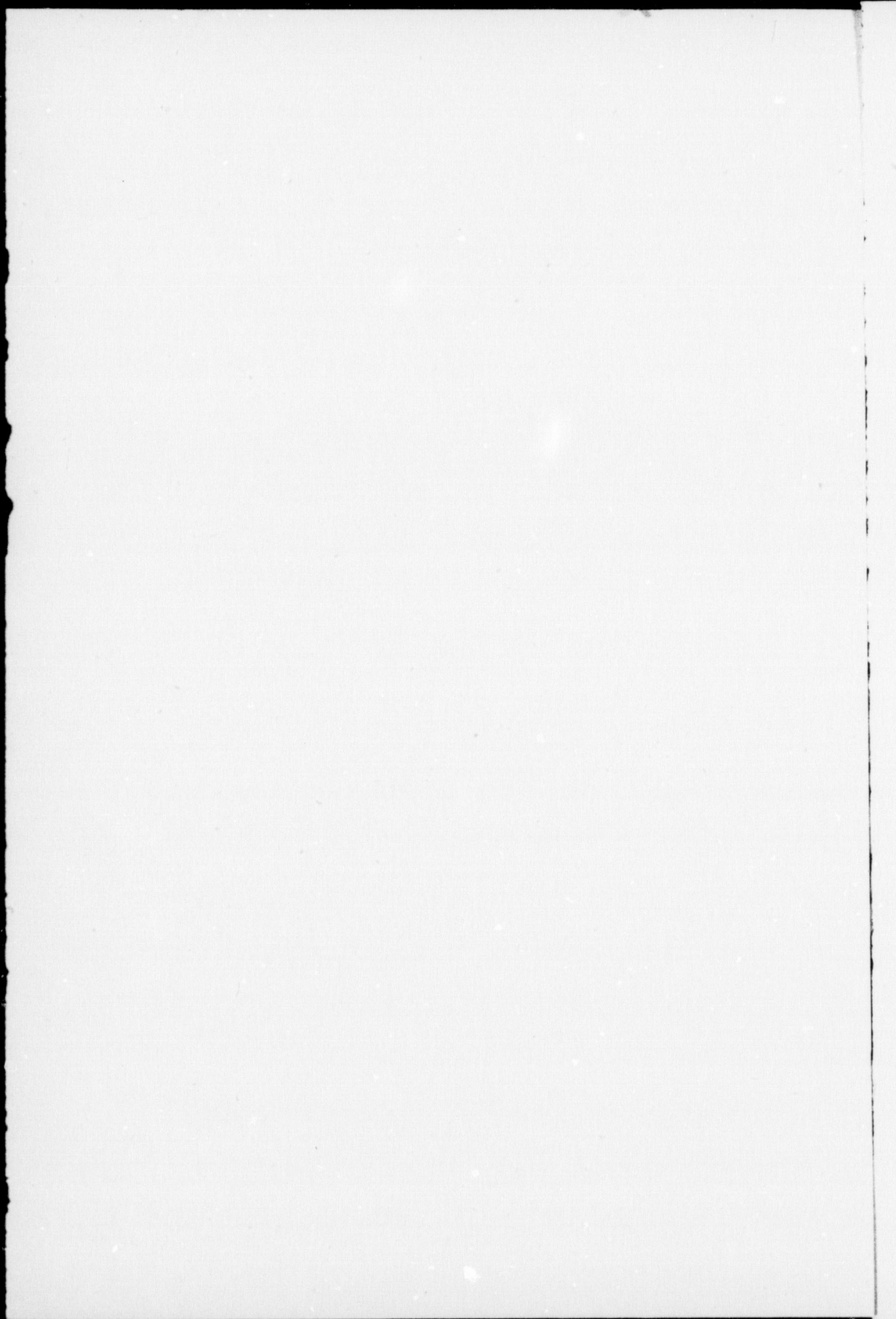


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**United States Court of Appeals
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Docket No. 74-2589

UNITED STATES OF AMERICA,

Appellee,

—v.—

AHARON RON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Aharon Ron appeals from an order filed on November 18, 1974, in the United States District Court for the Southern District of New York, by the Honorable Charles L. Brieant, Jr., United States District Judge, denying his motion filed under Rule 33 of the Federal Rules of Criminal Procedure, for a new trial on his conviction on Indictment 72 Cr. 216 for one count of unlawful transportation of stolen securities in foreign commerce (Title 18, United States Code, Section 2314), three counts of wire fraud (Title 18, United States Code, Section 1343), one count of mail fraud (Title 18, United States Code, Section 1341) and one count of conspiracy (Title 18, United States Code, Section 371) on the ground of newly discovered evidence.

Indictment 72 Cr. 216, filed on February 24, 1972, charged Louis Beck, Frederick Lee, Collin Garner, William Champion, Emanuel Lieberman, a/k/a "Manny Lester" and Aharon Ron with the above violations and one additional count of mail fraud.

Trial against all defendants but Lester, who was in jail in Canada at the time, commenced on February 6, 1973, and on March 5, 1973, the jury found Ron guilty on the counts set out above, and convicted Lee and Garner guilty on the conspiracy count and acquitted them on the substantive counts. On March 6, 1973, the jury acquitted Champion on the substantive counts. The jury was unable to reach a verdict as to Champion on the conspiracy count or as to Beck on any counts*. On April 23, 1973, Judge Briant sentenced Ron to two consecutive five year terms of imprisonment and he is currently serving his sentence**. Ron was also fined \$5000. These convictions were affirmed by this Court on October 31, 1973, 485 F.2d 677, and Ron's petition for certiorari was denied by the Supreme Court. 415 U.S. 935 (1974).

On November 19, 1973, the trial of Lester and the re-trial of Beck and Champion commenced before the Honorable Robert L. Carter. On December 20, 1973, the defendants were acquitted of all charges***.

Statement of Facts

The Government's Case ****

A. Introduction

The proof at trial established that Lee, Garner and Champion stole approximately \$850,000 of warrants of Leasco Data Corporation from the brokerage firm of Good-

* This trial is hereinafter referred to as "Beck I".

** Ron remained free on bail pending his appeal until he was discovered by federal border agents secreted in an automobile which was crossing the border from Canada. Bail was thereafter revoked and he was remanded.

*** This trial is hereinafter referred to as "Beck II".

**** The Government's case was essentially the same at both Beck trials.

body & Company in the fall of 1969. These securities, which were registered in "street name", were thereafter supplied to Lester and Ron, who in turn delivered them to Beck. Ron, who had introduced Beck to Lester, provided the financial backing for the scheme. Beck opened a trust fund account in the Bahamas in which he deposited the stolen securities, instructing the fund operators to sell them and send the proceeds to two Canadian bank accounts. These bank accounts had been set up by Lester in the name of Van Beuren. Although a partial sale of the securities was consummated and the money was sent from the Bahamas to the Canadian banks, Lester was arrested in Canada before he was able to withdraw all the funds*. Ron was able to obtain \$10,000 of the proceeds prior to Lester's arrest.

B. The Roles of the Conspirators

In the fall of 1969, Lee and Champion were both employed by Goodbody and Company. Champion held a supervisory position and had access to the "cage" area of Goodbody's back office where securities, including the Leasco Data warrants, were stored in a vault. Champion participated in taking inventories of the Goodbody securities and had the appropriate clearance to enter this vault (Tr. 952, 955)**.

Joseph Hagins, named as a co-conspirator in the indictment was the Government's chief witness at the trial. He introduced Garner to Lester in October, 1969, for the purpose of assisting Garner in cashing a corporate check (Tr. 379, 395). Lester told Garner at that time that he was

* A substantial part of the evidence at both trials was directed at showing that Louis Beck, the former Treasurer of the New York State Democratic Party, had established the trust fund and dealt with several New York banks to assist in the sale of the warrants. At Beck II a substantial part of the evidence was directed at Lester's activities.

** "Tr." refers to the trial transcript of Beck I, GX to Government exhibits at both trials, "A." to Ron's appendix.

more interested in disposing of other items, particularly treasury notes, and that he would pay 50% of the face value of any such securities that Garner could obtain (Tr. 398-400).

About one week later Hagins and Garner met Champion and Lee (Tr. 401, 402, 406-07). Hagins told Lee, Champion and Garner that he was experienced in disposing of stolen securities and had engaged in several successful deals with Lester in the past (Tr. 415, 748). He gave them a copy of Lester's police record and informed them that Lester could pay 50% of the face value for the securities within ten days after receiving them (Tr. 415, 752). At this meeting, Hagins agreed to be personally responsible for Lester's performance of his end of the bargain (Tr. 408, 416).

About two days later, on October 27, 1969, Garner delivered \$850,000 in Leasco Data warrants to Lester which had been stolen from Goodbody & Company in "street name" (Tr. 418, 523-26, 944-956, 1587-1591)*. Garner also brought a Goodbody rubber stamp which was used to make the warrants fully negotiable as of that date (Tr. 418-19, 517-19, 522, 524).

Thereafter Lester and Ron delivered the securities to Beck at Beck's office**. A day or two after the delivery of the securities Lester notified Hagins that due to the large quantity involved he could not sell all the warrants within ten days as previously agreed without unduly depressing the price (Tr. 530)***. On approximately October

* An unknown additional amount of warrants registered in the names of individuals and trust funds was also delivered at this time but were never sold.

** Beck testified that Ron told him that he had checked the securities with a lawyer and that they were legitimate and not stolen.

*** Hagins had met Lester at the Belmont Plaza Hotel in Manhattan where Lester, registered under the alias Emery, was sharing the room, according to the Hotel registration cards, with a Rabbi "Rhone".

29, 1969, Hagins and Garner met with Champion and Lee in a Brooklyn bar (Tr. 531-32). Hagins explained the difficulties facing Lester and Lester's plan to sell one block of the warrants each week with Lee, Champion and Garner receiving \$50,000 after each sale (Tr. 530, 533).

During the following week Hagins attempted to collect money from Lester to pay Lee, Champion and Garner who were pressuring him for payment*. At Lester's suggestion, Hagins went to Ron, who was the connection between Lester and Beck and who, Lester explained, was the financial backer for the scheme. Hagins obtained checks from Lester and Ron written on the account of Hechal Shalom, alleged to be an orphanage in Israel, from which checks Hagins was able to pay \$5,000 to Garner.

During the time that Beck was attempting to sell the warrants and Hagins was attempting to collect money, Hagins went to Ron's apartment a number of times. Ron told Hagins what he intended to do with the proceeds of the Leaseo warrants and also described other frauds he was involved in. During one of Hagins visits to Ron's apartment, Hagins was told to wait in the bedroom while Ron met with some people. During this meeting Beck came into the bedroom inquired whether Hagins knew Mannie Lester, was he the source of the stolen securities and whether he could obtain more. Not having met or seen Beck before, Hagins refused to answer the questions until Ron advised him that it was safe. Then Hagins said he was the source and could get more (Tr. 557-561).

Thereafter on November 12, 1969, Lester notified Hagins that he had some checks which represented part of the proceeds of the sale of the stolen securities and which if they could be cashed, would yield some money. Hagins and Lester then went to various locations where Lester tried

* Lester offered to pay in blank United States Postal Money Orders but Hagins rejected this (Tr. 573).

to cash two checks for \$20,000 and \$70,000 drawn on the Bank of Montreal (Tr. 575-77, 580-82) and made payable to Lester's alias "Van Beuren." Although that bank's New York City branch refused to cash the checks, it did exchange them for nine \$10,000 checks (Tr. 576). Lester was finally able to cash one of these checks when Hagins drove Lester to meet Beck, and then Beck and Ron accompanied Lester to a bank with which Beck had a business relationship. When Lester cashed the \$10,000 check, in the presence of Ron and Beck, he represented himself to be Van Beuren and displayed false identification (Tr. 1175-1178). The bank employee believed he recognized Lester from an earlier business transaction and in Ron's presence asked Lester if he was Lester. Of course, Lester denied his true identity. Lester then gave \$10,000 to Hagins and a \$10,000 check to Ron and stated that he would go to Canada to cash the other checks (Tr. 582).

On the same evening Hagins met Lee and Garner at a lounge in Manhattan. When Hagins explained that he only had \$10,000 to give to them because of the problems of cashing the checks, Lee became upset at not receiving the expected \$50,000 in full and said that Champion would also be upset (Tr. 585, 799). Hagins assured Lee that the other \$80,000 in checks existed and had come from Canada and agreed to send someone to Canada to make sure Lester performed his part of the bargain (Tr. 584-5). Hagins turned over the \$10,000 to Lee at the end of the meeting, and was then given, at his request, \$1,000 for expenses. Lee then handed Garner \$1,000 and kept the remaining \$8,000 (Tr. 586).

On the next day, November 13, 1969, Lester was arrested by the Canadian authorities and the entire scheme collapsed.

Unrelated to the Leasco Data Warrant scheme the Government also proved as a similar act Ron's involvement with Lester in stolen Westinghouse securities. The proof estab-

lished that during 1969 Ron used stolen Westinghouse securities as collateral for a loan from the First National City Bank. The documents, including hypothecation agreements furnished by Ron to establish his rightful possession of these stolen securities, were executed by "Michael C. Van Beuren"*.

The Defendants' Cases

Ron did not testify nor did he call any witnesses. Beck testified at both trials and Lester at the second trial.

ARGUMENT

POINT I

Hagins' Testimony Was Not Perjurious And Is Corroborated by Independent Evidence. An Inconsistency Which May Exist In His Testimony Could Have Been Explored At Ron's Trial.

Ron claims that an inconsistency in Hagins' testimony at the two Beck trials relating to checks he received from Ron and Lester reveals perjury at Beck I. According to Ron, this perjury at his trial establishes that Ron did not meet Hagins until after the conspiracy ended with Lester's arrest on November 13, 1969. Therefore, Ron could not have been a participant in the conspiracy. This claim is without merit.

At Beck I Hagins testified that in early November, 1969, he received a check from Lester for \$5000 in part payment to Garner, Lee and Champion for the Leasco Data warrants.

* Additional hypothecation agreements, some already executed were lawfully seized at Lester's Belmont Plaza Hotel room after his arrest in Canada. There was also testimony that during the time of the conspiracy Ron was involved in other frauds (Tr. 828).

According to Hagins, he "discounted" this check, which was drawn by Ron on the account of Hechal Shalom, an Israeli orphanage, with a jeweler for \$4600. The check bounced, however, and Hagins went to Ron's apartment to complain. Ron took him to the bank, where they cashed two checks drawn to Hagins' order by Ron on the Hechal Shalom account, one for \$4600 (GX 34) to repay the jeweler for the bad check Lester had given Hagins, and the other (GX 35) for \$5000 to be given to Garner, Lee and Champion by Hagins. (Tr. 534-542).

At Beck II Hagins testified to only two checks, one received from Lester which bounced (GX 34) and one received from Ron (GX 35) to pay Garner, Lee and Champion. (Beck II Tr. 486-487, 489-491).

Ron now erects the following elaborate structure which he claims proves perjury by Hagins at Beck I, at which Ron was a defendant. According to Hagins' testimony at Beck II, GX 34 was received not from Ron but from Lester. GX 34 bears a date of cashing of November 19, 1969. Since Hagins testified at the second trial that he cashed GX 34 before his first meeting with Ron, and since Lester was arrested on November 13, 1969, Hagins could not have met Ron until after Lester was arrested, and Hagins' testimony to the contrary was perjury.

This legerdemain with Hagins' inconsequentially inconsistent testimony at the two trials cannot withstand any serious scrutiny. The faces of the checks bear dates of making of November 3, 1969 (GX 34) and November 7, 1969 (GX 35). These same dates appear on Ron's Hechal Shalom checkbook stubs, which were received in evidence at Beck I as part of GX 37. Ron ignores the evidence from Ron's bank statement that the \$4600 check (GX 34) was first presented for payment and bounced by the drawee bank on November 6, 1969. He ignores the fact that Hagins testified consistently at both trials that he received a check for

\$5000 from Ron (GX 35), which was signed by Ron, which they cashed together and part of which was used by Hagins to pay Garner. Most significantly, that check, GX 35, which was received in evidence at both trials, is dated November 7, 1969, was cashed November 7, 1969, nearly one week before Lester was arrested, and was endorsed on the back by both Hagins and Ron, with Ron's signature beneath Hagins'.

The only fact which underpins Ron's claim—that at the first trial Hagins said that both GX 34 and GX 35 were cashed together by Ron and Hagins at their first meeting—was plainly shown to be wrong by a comparison of the checks themselves with Ron's bank statement, all in evidence at Beck I. The attenuated theory erected by Ron now on the inconsistency in Hagins' testimony between the two trials as to what GX 34 was and from whom it was received is not newly discovered, of any substantial significance, or in any meaningful way impairing of the testimony of Hagins regarding his receipt of GX 35 from Ron and the documentary evidence of its cashing on November 7, 1969, after being endorsed by both Hagins and Ron. Indeed, Ron virtually concedes that the error made by Hagins in his testimony is inconsequential except insofar as it is evidence of what Ron claims was perjury throughout Hagins' testimony (Brief at 30). The difficulty with that contention is that there is no evidence of any perjury beyond what is quite obviously a rather inconsequential and inadvertent variance in testimony on an immaterial point. On the essential points Hagins testified consistently at both Beck trials and he was corroborated by independent evidence.*

* Ron's claim that Hagins' reference to three checks at Beck I foreclosed any opportunity to effectively cross-examine Hagins on GX 34 and GX 35 is frivolous. Since Hagins testified at Beck I that this third check, received from Lester, was drawn on Ron's Hechal Shalom account (Tr. 833), Ron's own checkbook stubs which were in evidence provided Ron with evidence to cross-examine Hagins on this point. These stubs, combined with
[Footnote continued on following page]

Clearly, the variance in Hagins' testimony is not perjury and not critical, as Judge Bricant found. See *United States v. Passero*, 290 F.2d 238, 244 (2d Cir.), *cert. denied*, 368 U.S. 829 (1961); *United States v. Munchak*, 338 F. Supp. 1283 (S.D.N.Y.) (Weinfeld, J.), *aff'd*, 460 F.2d 1407 (2d Cir. 1972). The inconsistency in Hagins' testimony is at most cumulative and impeaching; * the arguments sought to be made now could have been made at Beck I, *United States v. Costello*, 255 F.2d 876 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *United States v. DeSapio*, 456 F.2d 644, 647 (2d Cir. 1972), and in any event would not probably result in an acquittal at a new trial.** See *United States v. Kahn*, 472 F.2d 272, 288-289 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973), *Cf. United States v. Brawer*, 367 F. Supp. 156 (S.D.N.Y. 1973), *aff'd*, 496 F.2d 703 (2d Cir. 1974). In addition, Hagins' version of the meetings with Ron is supported by independent documentary evidence *** of the

GX 34 which bears a November 19, 1969 stamp, could have been used by Ron at Beck I to make the very arguments he is now pursuing. For precisely these reasons it is irresponsible for Ron to claim that the Government is guilty of misconduct for "allowing" Hagins to testify about three checks at Beck I (Brief at 36-37).

* In Beck I Hagins was cross-examined extensively by four experienced defense attorneys about his past criminal dealings in counterfeit and stolen securities and schemes to defraud involving hundreds of thousands of dollars and his "deal" with the Government in exchange for his cooperation (Tr. 627-30, 640, 681-84, 768 and 776). He was vilified during defense summations (see, e.g., Tr. 2498, 2500, 2545, 2547).

** The Court below properly rejected the application of *United States v. Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), modified on different grounds, 439 F.2d 1198, *cert. denied*, 402 U.S. 953 (1971), since there is absolutely no evidence to support a claim of misconduct or suppression by the Government. *United States v. DeSapio*, 435 F.2d 272, 286 n. 14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

*** As Ron's counsel concedes, a plausible explanation for this type of inconsistency is perhaps Hagins "... innocently or negligently made a mistake about the number of checks he once received from another person or the order of the checks or the amount of each check ..." (Brief at 29-30).

bank transactions, and his testimony on other matters was substantially corroborated at trial (A. 34-A. 35). Moreover, the trial testimony of a businessman and a banker that Ron was using other stolen securities, signed with one of Lester's aliases, as collateral for a loan rebutted his contention at trial that he was an innocent victim of Lester. The order of the District Court denying Ron a new trial is supported by the evidence and the law, and its affirmance is compelled by this Court's decision in *United States v. Zane*, 507 F.2d 346 (2d Cir. 1974).

POINT II

Lester's Testimony Is Not Newly Discovered.

At the trial of Beck II Lester testified in his own defense, offering an innocent explanation for his possession of the stolen Leasco securities. Ron claims that Lester was unavailable and unwilling to testify at Beck I. Therefore, he argues, his testimony is newly discovered and of such a character that Ron is entitled to a new trial at which he should be allowed to put a transcript of it into evidence.* This claim is frivolous.

Ron concedes that he knew the substance of Lester's exculpatory story at the time of Beck I. However, Ron never asked for a severance or an adjournment to await Lester's return to the United States for trial. No effort was made by Ron to establish that Lester would testify if a severance were granted. Nor did Ron attempt to depose Lester pursuant to Rule 15 of the Federal Rules of Criminal Procedure.

Ron now claims that Lester was unwilling to testify at the time of Beck I, but candidly admits that at the time of Beck I he knew that Lester had already been convicted in

* Lester committed suicide shortly after his acquittal.

Canada on charges growing out of the Leasco warrant theft and that he had testified about the Leasco warrants in a civil deposition in Canada.* Ron cannot rely on Lester's refusal to answer questions put by the F.B.I. as a basis for asserting that Lester was unavailable to testify at trial. Ron was obligated to call him as a witness or at least attempt to depose him. *United States v. Sanchez*, 459 F.2d 100 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972); *United States v. Maddox*, 444 F.2d 148, 151-152 (2d Cir. 1971).

Ron's real reason for not seeking to depose Lester or seeking a severance or adjournment to obtain Lester's testimony was sensible trial strategy.** Lester had a criminal record of five federal felonies, and his conviction in Canada related to the very transactions on trial in Beck I and II.*** As the Court noted below, the tactical decision not to rely on Lester was a reasonable one. The theory adopted by Ron and Beck at Beck I was that Lester was the crook and "con" man who victimized them. Ron's attorney conceded many of the facts proved by the Government and disputed only the element of Ron's knowledge that the securities were stolen.**** Now that Lester has been acquitted, Ron's new lawyer wants to vouch for Lester's credibility and rely on

* In fact, Ron had a copy of this deposition which was marked as Court's Exhibit 5 at Beck I.

** As Ron knew at the time of Beck I, Lester had stated that he knew the persons who stole the securities and would identify them if granted immunity. Furthermore, Lester, using the ruse of letters marked "Religious Mail-Privileged" had advised Ron from his Canadian jail in 1969 not to answer any questions for the Federal Bureau of Investigation or "... you will convict yourself".

*** Although the source of the stolen securities was the same in this case and the Canadian case, the cases differed in the certificates sold and the individuals involved in their illegal distribution in Canada.

**** "... What has the Government failed to prove? They have failed to prove that Ron knew the stocks were stolen. They can prove that Ron was here, here, here, here, he is everywhere, signed his name to checks ..." (Tr. 2555).

an exculpatory version of the facts known to Ron since 1969.

Obviously, this is not newly discovered evidence. It was available at Beck I, and Ron chose instead a defense antagonistic to Lester's claim of innocence. A change of tactics is not grounds for a new trial. See *United States v. Costello*, *supra*; *United States v. DeSapio*, *supra*, 456 F.2d at 649; *United States v. Soblen*, 301 F.2d 236, 242 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962).

Moreover, and contrary to the fundamental assumption underlying Ron's claim that Lester's testimony would cause a different outcome were Ron to have a new trial, it is clear that, as Judge Brieant pointed out, the opposite is a more likely prospect. Lester had a record of five federal felony convictions and in Judge Brieant's words: "Lester was a convicted felon who was so mendacious that he denied his own convictions when confronted with documentary evidence thereof at his own trial." (A-42). The availability of the testimony of such a man cannot support a new trial. *United States v. Maddox*, *supra*; *United States v. Trudo*, 449 F.2d 649, 653-654 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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